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No. 91-408

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DENVER EARL ANDERSON,

Petitioner,

v.

UNITED TELEPHONE COMPANY OF KANSAS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Tenth Circuit properly affirm the order of the district court entering judgment notwithstanding the verdict for respondent in a civil action in which petitioner had failed to plead or prove the prior criminal conviction of respondent which had been interpreted to be a necessary element of petitioner's cause of action under the Kansas blacklisting statute where respondent had raised the defense of failure to state a claim in its answer and had moved for a directed verdict at the close of petitioner's case and at the close of all the evidence on the basis that the evidence was insufficient?

2. Was the district court required to certify issues of Kansas statutory construction to the Kansas Supreme Court when none of the parties requested certification pursuant to Kan.Stat.Ann. §60-3201 and has the petitioner waived this issue by not presenting it to either the district court or the court of appeals?

3. Does the equal protection clause of the fifth amendment to the United States Constitution require that the Kansas blacklisting statute be construed to provide for civil liability in the absence of a criminal conviction when the statute provides that civil liability may only be imposed upon those "found guilty of the violation of this act", and has petitioner waived this issue by not presenting it to either the district court or the court of appeals?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent United Telephone Company of Kansas,[1] respectfully suggests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the Court of Appeals for the Tenth Circuit. That opinion is reported at 933 F.2d 1500.

[1] The parent company of respondent is United Telecommunications, Inc.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE DISTRICT COURT.

Respondent wishes to correct the misstatements and omissions in petitioner's statement of the case as follows:

Respondent moved for a directed verdict on all five counts of petitioner's complaint at the close of petitioner's case. After oral argument, the court granted the motion on the fraud claim, and advised petitioner that the blacklisting claim would be submitted on a special verdict form so that the court could correct the verdict if necessary. The court subsequently submitted the case (exclusive of the fraud count) to the jury pursuant to Federal Rule of Civil Procedure 49(a) on a special verdict form. Although the jurors' responses to special questions 11 through 15 were favorable to petitioner, the court never entered judgment for petitioner on the responses although petitioner moved for the same on March 17, 1989.

After both parties filed their respective post-trial motions, the district court entered its Order on April 17, 1989 setting the motions for oral argument and directing the parties' attention to two unpublished opinions relating to the necessity of a criminal conviction as a prerequisite for civil liability under K.S.A. §44-119. The Order also granted the parties leave to file supplemental briefs. Both parties filed these on May 8, 1989. At that time, respondent specifically raised the requirement of a criminal conviction. Subsequently, the court entered its Order of May 22, 1989 granting respondent's Motion for Judgment

Notwithstanding the Verdict on the grounds that a criminal conviction was a prerequisite to civil liability under K.S.A. §44-117 which petitioner had not proved and that respondent had preserved the issue by raising the defense of failure to state a claim in its Answer.

Respondent disagrees with petitioner's statement of the facts to the extent it states that the sole issues herein are legal issues. In addition, petitioner's assertion that the jury returned a verdict for petitioner on the "blacklisting" count in the amount of $256,000.00 is erroneous. Rather, the jury responded favorably for petitioner in response to special questions 11 through 15 presented to it on the special verdict form.

Respondent states that there are factual issues in this case, i.e., whether in the event this Court disagrees with the Tenth Circuit's reasons for affirming the entry of judgment notwithstanding the verdict, the evidence was nevertheless insufficient to support the jury's responses as well as whether respondent is entitled to a new trial. Accordingly, the following constitutes the factual underpinnings of petitioner's claims that he was "blacklisted" in violation of K.S.A. §§44-117-119.

A. The Basis of Petitioner's Claim that Respondent "Blacklisted" Him From Obtaining Employment with United Telephone Company of Missouri

Petitioner's employment with respondent was terminated by respondent on November 26, 1985 to be effective December 31, 1985. (Tr. Vol. II at 224 and 234.) On December 14, 1985, petitioner interviewed with United Telephone Company of Missouri. United Telephone Company

of Missouri and respondent United Telephone Company of Kansas are two of the operating companies known as the "Midwest Group" which are wholly owned subsidiaries of United Telecommunications Inc. ("UTI"). (Doc. 1, p. 2.) All Midwest Group companies share a centralized personnel department. (Tr. Vol. V at 854-856.) At the time of petitioner's termination, Don Bowen was the Personnel Director of both the Kansas and Missouri companies. (Tr. Vol. V at page 857.) He learned of petitioner's interview and notified the Missouri company of petitioner's termination from the Kansas company. (Tr. Vol. IV at 660-663.) Petitioner was not offered employment by the Missouri company and asserts this denial of employment as a basis for "blacklisting" liability under K.S.A. §44-119.

B. The Basis of Petitioner's Claim that Respondent "Blacklisted" Him From Obtaining Employment with Installation Technicians, Inc.

In addition, at the time of petitioner's termination, respondent contracted telephone installation work with various independent companies, including a company known as Installation Technicians, Incorporated (hereinafter referred to as "ITI"). (Tr. Vol. III at 434.) Respondent's employee, Eugene Trinkler, advised ITI's president, Jerry Schuetz, that he did not want terminated United employees working on United jobs. (Tr. Vol. III at 440-442, 456.) However, Mr. Schuetz was thereafter advised by Don Bowen that he could use whomever he wanted. (Tr. Vol. IV at 726.) ITI's president testified that petitioner was not denied employment because of any urging by respondent and stated that all positions for

which petitioner was qualified were filled. (Tr. Vol. III at 455 and Volume IV at 731.)

REASONS FOR DENYING THE WRIT

I. THE OPINION OF THE TENTH CIRCUIT COURT OF APPEALS AFFIRMING JUDGMENT NOTWITHSTANDING THE VERDICT DOES NOT CONFLICT WITH OTHER COURTS OF APPEAL.

The Tenth Circuit Court of Appeals correctly held that respondent's Motion for a Directed Verdict on the basis of insufficiency of the evidence preserved respondent's challenge to petitioner's failure to prove a criminal conviction of the Kansas blacklisting statute in its Motion for Judgment Notwithstanding the Verdict. Petitioner's assertion that the Tenth Circuit Court's decision conflicts with decisions of that and other circuits is without merit.

None of the cases upon which petitioner relies conflict with the opinion of the Tenth Circuit Court of Appeals that a motion for directed verdict challenging the sufficiency of the evidence on a specific count preserves the issue for a subsequent motion for judgment notwithstanding the verdict. Nor do any of the cases cited by petitioner involve a challenge to the sufficiency of the evidence which insufficiency is impossible to remedy as the petitioner admits is the case in the instant matter. *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275 (8th Cir. 1981) involved a general motion for directed verdict not directed to any counts or issues; *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3217 (1990) involved a post-trial

argument directly contrary to the argument raised in the directed verdict motion; *Brooks v. Monroe Sys. For Business, Inc.*, 873 F.2d 202 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 154 (1989), involved the failure to prove a condition precedent which failure was not raised in the motion for directed verdict; *Dow Chemical Corp. v. Weevil-Cide Co.*, 897 F.2d 481 (10th Cir. 1990) involved a motion for directed verdict which did not raise the issue of the petitioner's fault in a subrogation claim; and *Karns v. Emerson Elec. Co.*, 817 F.2d 1452 (10th Cir. 1987) involved the failure to renew a motion for directed verdict at the close of all the evidence.

Indeed, the analysis of the Tenth Circuit Court of Appeals as to whether the purposes of Rule 50 of the Federal Rules of Civil Procedure were served in this case is consistent with the liberal construction of the rule applied by other circuit courts. *See Acosta v. Honda Motor Co.*, 717 F.2d 828 (3rd Cir. 1983); and *FSLIC v. Reeves*, 816 F.2d 130 (4th Cir. 1987).

As the court of appeals correctly found, the purposes of Rule 50 were served because petitioner could not overcome the evidentiary failure as he conceded respondent was never criminally convicted of a violation of the statute. Moreover, the record clearly indicates that the district court apprised petitioner of problems with his theory at the close of petitioner's case, announcing that he would submit the case to the jury on a special verdict form so that the novel issues raised by the statute could be addressed post-trial in the event of a verdict favoring petitioner:

> THE COURT: There's no law on this statute, Kansas has never used it. You're the first people

> that have even tried to use it that I can remember. And there's just no law, and, you know, if you get a verdict on this, I'd say your chances are probably pretty good it would be reversed. [Tr., Vol. IV at 716.] . . .
>
> THE COURT: Frankly, my thought is probably I am going to let this go to the jury on blacklisting, but I am going to separate all these claims out on a verdict form so if I later determine that there's something wrong, I can knock out at least part of this case. [Tr., Vol. IV at 719-720.]

Finally, because this case was submitted to the jury pursuant to Federal Rule of Civil Procedure 49(a), the district court properly found that no criminal conviction was proved and entered judgment upon the special verdict. *See Traders and General Ins. Co. v. Mallitz*, 315 F.2d 171 (5th Cir. 1963) (even failure to move for a directed verdict does not prevent the rendering of a proper judgment upon a special verdict). *Accord, Ingersoll v. Mason*, 254 F.2d 899 (8th Cir. 1958); 9 Wright and Miller, *Federal Practice and Procedure:* Civil §2510 (1969).

II. THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT PROOF OF A CRIMINAL CONVICTION IS AN ELEMENT OF PETITIONER'S CAUSE OF ACTION AND NOT A CONDITION PRECEDENT.

The Tenth Circuit Court of Appeals correctly ruled that proof of a criminal conviction was not a "condition precedent", but rather an element of petitioner's cause of action for blacklisting which he simply failed to plead or prove. Petitioner cites no authority to the contrary: the

cases cited by petitioner did not involve a criminal conviction or the Kansas blacklisting statute. *Ginsburg v. Ins. Co. of N. Am.*, 427 F.2d 1318 (6th Cir. 1970) and *Lumbermens Mut. Ins. Co. v. Bowman*, 313 F.2d 381 (10th Cir. 1963) involved notice to and filing of proof of loss on insurance policies; *Brooks v. Monroe Sys. for Business, Inc.*, 873 F.2d 202 (8th Cir. 1989), and *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir. 1982) involved administrative prerequisites to a Title VII action; and *McKee-Berger-Mansueto, Inc. v. Board of Educ.*, 626 F.2d 559 (7th Cir. 1980) involved contractual nonperformance. There is simply no basis for petitioner's assertion that a criminal conviction should be considered a condition precedent as opposed to an element of petitioner's claim.

Indeed, even if the court of appeals improperly decided that a criminal conviction was an element of petitioner's cause of action (as opposed to a condition precedent) respondent was not required to specifically deny the same because petitioner had failed to generally aver that all conditions precedent have occurred as required by Federal Rule of Civil Procedure 9(c). As the district court correctly noted:

> Nowhere in his pleadings does petitioner state that all conditions precedent have occurred. Therefore, Rule 9(c) is inapplicable and defendant was not required to make more than a general denial of the legal sufficiency of plaintiff's claim. (App. at 66).

Finally, petitioner's brief erroneously asserts that respondent did not timely raise the defense of failure to state a claim. As the court of appeals correctly found, "[t]he respondent here raised the defense of failure to

state a claim for blacklisting at the first opportunity in the answer to the complaint." 933 F.2d at 1504.

Thus, the Tenth Circuit Court's opinion does not conflict with *Brooks v. Monroe Sys. for Business, Inc.*, 873 F.2d 202 (8th Cir. 1989) (which involved a Title VII agency exhaustion claim) or *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226 (10th Cir. 1987) (motion to dismiss for failure to state a claim held timely filed).

III. THIS COURT SHOULD NOT CONSIDER PETITIONER'S CONSTITUTIONAL ARGUMENTS WHICH WERE NOT PRESENTED TO THE DISTRICT COURT OR COURT OF APPEALS AND WHICH DO NOT MERIT REVIEW BY THIS COURT

For the first time, petitioner in his petition for certiorari has raised the issue of the constitutionality of construction of the Kansas blacklisting statute. This Court's jurisdiction to review decisions of the lower courts by certiorari is a limited one. It is usually not exercised when an issue has not been previously briefed and addressed, and it is untimely for petitioner to raise a constitutional argument at this juncture. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below . . . [T]his is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.* at 120 (1976). (Citations and quotations omitted).

Not only is petitioner's constitutional argument untimely, it is without merit as there is no basis for finding the Kansas blacklisting statute unconstitutional. The district court in this case held that the plain language of the Kansas blacklisting statute, K.S.A. §§44-117-119, requires an employer to be found guilty in a criminal proceeding before it may be subjected to civil liability. The Court of Appeals for the Tenth Circuit similarly held that in examining the statutory language and applying its ordinary meaning, "we are convinced the Kansas Legislature meant a corporation shall 'be liable' only when it has been 'found guilty' of criminal blacklisting."

Petitioner contends that the above interpretation is unconstitutional, relying upon *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) in which this Court held that a criminal conviction was not a prerequisite to a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968. However, the *Sedima* opinion dealt specifically with the construction of the RICO Act and addressed the lower court's concern that *elimination* of the criminal conviction prerequisite would raise "severe constitutional questions". *Id.* at 492. In rejecting this argument, the Court gave no indication that the statute itself could be found unconstitutional. Rather, based upon a record replete with a particular legislative purpose, the Court determined that a criminal conviction was not a prerequisite to civil liability. *Id.* at 493.

The Kansas blacklisting statute is distinguishable from the RICO Act in that the language of the Kansas statute clearly requires a criminal adjudication of guilt before imposing civil liability. Only if the statute is

ambiguous and unclear may the Court disregard the statute's plain and literal meaning. *Boaldin v. Univ. of Kansas*, 242 Kan. 288, 747 P.2d 811, 814 (1987). In construing the scope of a statute, its language, if unambiguous, must be regarded as conclusive "in the absence of a clearly expressed legislative intent to the contrary". *United States v. Turkette*, 452 U.S. 576 (1981). Thus, petitioner's citation of 16 C.J.S. §96 stating that a statute must always be given an interpretation that is constitutional is irrelevant as no real question regarding the constitutionality of the Kansas blacklisting statute has been raised.

Petitioner also contends the Kansas blacklisting statute violates the equal protection clause of the fourteenth amendment, apparently based upon the assumption that not all prosecutors will perform their duties to their fullest abilities. As a consequence, petitioner contends, some employees will be able to bring a private action after a criminal conviction has been rendered while others, where prosecutors were less diligent, will be unable to redress their wrongs. Of course, the assumption of nonfeasance renders all statutes and laws unconstitutional which, if not properly enforced, would render unequal results. Clearly, such an assumption begs the question of whether the Kansas legislature can decide to create a remedy only for victims of criminal activity, as opposed to non-criminal activity. Petitioner cites no authority for the proposition that such a statute violates the equal protection clause.

Petitioner also contends for the first time on appeal that the petitioner was deprived of his fifth amendment due process rights because the statutory interpretation issue was not certified to the Supreme Court of Kansas.

Apparently, petitioner contends that the Kansas certification statute is a "procedural safeguard" to prevent the federal district court from improperly applying the law of the forum state as required in this diversity case by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Petitioner not only fails to cite any authority for the proposition that the due process clause requires a federal district court sitting in a diversity case to abdicate its authority to a state supreme court, but also fails to mention that the applicable certification statute, K.S.A. 60-3201, is a discretionary one, providing that a court "may" accept certification. Indeed, although petitioner contends that the district court *failed* to certify or allow for certification to the Supreme Court of Kansas, the record will reflect that petitioner has never made a request for certification as permitted by the statute.

IV. THE JUDGMENT NOTWITHSTANDING THE VERDICT WAS CORRECT BECAUSE THE EVIDENCE WAS OTHERWISE INSUFFICIENT TO ESTABLISH A VIOLATION OF THE KANSAS BLACKLISTING STATUTE.

Respondent respectfully suggests that the evidence was otherwise insufficient to support the jury's responses to the special questions. There was no evidence that petitioner had an expectation of employment with United Telephone Company of Missouri. The person in charge of hiring at the Missouri company knew petitioner and testified that petitioner "talked more than he worked" and that he probably would not have hired petitioner had he completed the interview with him. On the other hand, the

president of ITI stated he had no positions available for petitioner.

Secondly, United Telephone Company of Missouri and United Telephone Company of Kansas are "sister" companies that share a centralized personnel department. There was no evidence that respondent prevented petitioner's employment with "another corporation" when its affiliate determined not to hire petitioner. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) and *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987).

Finally, there was no evidence that respondent's actions were not justified. Mr. Bowen was clearly justified in sharing information with his "employer" United Telephone Company of Missouri. Similarly, Mr. Trinkler had a legitimate concern when he requested that ITI not use terminated employees on United property.

CONCLUSION

The Petition presents no important question of federal law nor any conflict among the circuit courts of appeal. This case turns upon facts unique to this case and these parties and the Tenth Circuit Court of Appeals properly affirmed the decision of the district court. There is no need for additional review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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